VIRGINIA
LAW REVIEW

VOL. VI. OCTOBER, 1919 No. 1

SHOULD THE SHERMAN LAW BE REVISED?

THE termination of the European War has brought forward many intricate problems with respect to the readjustment of the world's affairs. Intimately connected with these problems there are many questions purely domestic in nature, but nevertheless important in connection with the restoration of the internal affairs of this country to a normal or peace basis. During the period in which the United States was actively engaged in the War, the necessity for prompt and vigorous action caused the adoption of many measures which were predicated upon the avowed disregard of statutory requirements which in times of peace were the established and recognized law of the land. Conspicuous among these was the action taken by some of the executive departments of the Government and by many of the bureaus or boards which were established by the Government for the special purpose of assisting in the conduct of the War. These departments and boards, with full official sanction and with universal recognition of the propriety of their action, permitted and even required co-operative agreements and activities in interstate trade and commerce which, except for the exigency created by the War, would in all probability have met with official condemnation and attack as constituting a violation of the Sherman Anti-Trust Law. Under the spur of necessity, however, and by reason of the high and patriotic purpose for which these things were done, and especially in view of the expedition and efficiency which resulted therefrom, these actions deservedly met with approbation.

As a result of the experience which was thus acquired, showing the efficiency and despatch with which intricate affairs of business could be conducted, when conducted through intelligent co-operation, a body of opinion has arisen to the effect that the efficiency thus found to ensue from intelligent co-operation, as contrasted with the slower and less efficient results following from unrestricted and enforced methods of competition, could with advantage be adopted as a permanent system for the future conduct of the business of the country. The exigency of war having, however, passed, it is recognized that the co-operation which was permitted during the conduct of the War would, now that the War is over, be impossible because of the prohibitions of the Sherman Anti-Trust Law.

Underlying a proper conception of the subject, there are economic and legal questions of comprehensive and intricate character, so that an adequate treatment of the problem would require an extended discussion reaching the proportions of a treatise. The necessary limits of this paper, therefore, compel its compression into a limited scope, which will result in the views here presented being merely suggestive.

In order to set forth briefly the existing situation, it is necessary to make a brief review of the history of the Sherman Anti-Trust Law.[1] Beginning with the early seventies, the Standard Oil Company began to exert great power in the oil industry of this country, so that within a few years it obtained a dominant position. Following its example, other important industries were brought within the control of large aggregations of capital, with the result that most, if not all, of the important industries of the country were combined in huge corporations popularly designated trusts.

Widespread public objection and protest were caused by the growing power of these great organizations, with the result that in 1890 Congress enacted the Sherman Anti-Trust Law. This law was under debate in Congress from 1888 to 1890 and received thorough-going and painstaking care on the

[1] See an article by the writer "THE FEDERAL ANTI-TRUST LAW AND THE 'RULE OF REASON'," 1 VA. LAW REV. 188.

part of statesmen, many of whom occupied foremost positions in the profession of the law. It is a significant fact that the debates which thus occurred were limited entirely to the question of the necessity of disrupting and repressing these great trusts. The debates disclose that no consideration was given to the necessity of any statute with respect to the enforcement of the common law doctrine against restraints of trade, except in so far as that doctrine was capable of use as an instrument for the disruption and repression of the great trusts. The multitude of co-operative agreements among competitors, where the same fell short of monopoly or an effort at monopoly, were not taken into account.

This view of the purpose which Congress had in enacting the Sherman Law is confirmed by the statement made by the Circuit Court for the Eastern District of Louisiana in United States *v.* Workingmen's Amalgamated Council[2] and which statement was quoted with approval by the Supreme Court in Loewe *v.* Lawlor[3] and is as follows:

> "I think the Congressional debates show that the statute had its origin in the evils of massed capital; but, when the Congress came to formulating the prohibition * * * it expressed it in these words: 'Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal.' The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with."

The new law thus enacted was first tested in the United States Supreme Court in the case of United States *v.* E. C. Knight Co.,[4] and upon the basis of that decision (which has since been the subject of strongly adverse criticism) the new law was erroneously deemed by the profession and by the community generally to be inapplicable to the very combinations and trusts against which it was specifically directed. Many years elapsed before this erroneous impression was corrected, until finally,

---

[2] 54 Fed. 994.
[3] 208 U. S. 247, 301.
[4] 156 U. S. 1.

in 1911, the Supreme Court, in the famous cases of the Standard Oil Company[5] and the so-called Tobacco Trust[6] defined the scope of that law in such manner as to leave no doubt that it was sufficient to carry out the purpose for which it had been enacted by Congress.

Since the decisions in those cases, the Supreme Court has, in many subsequent cases, re-affirmed and reiterated the drastic power of the Sherman Law with respect to combinations or agreements in restraint of trade.

It is interesting, both from an economic standpoint and from a juridical standpoint, to note that coincidentally with the rendition of these decisions directed against combinations in the nature of trusts, the Federal courts have rendered decisions under the Anti-Trust Law in which co-operative agreements among competitors in trade have likewise been declared unlawful, even where their effect is not that of creating a monopoly.

It is out of this latter aspect of the matter that, ever since the rendition of the decisions in the Standard Oil Company Case and the American Tobacco Company Case, a sentiment has been developing in this country to the effect that whereas, on the one hand, the prohibitions of the Sherman Law have been wisely exerted against the great combinations in the nature of trusts and should continue to be so exerted, its power, on the other hand, in preventing a great variety of co-operative agreements among competitors, where monopoly is not aimed at or possible, has been wrongly exerted, to the economic detriment of the trade and commerce of this country.

Those who advance this view find encouragement in the fact that the condition mentioned exists in no other country than in the United States. Particular reference is made by them to England. They argue that although the common law doctrine forbidding restraints of trade, which constitutes the fundamental basis of the Sherman Anti-Trust Law, had, of course, its origin in the ancient common law of England, the courts of England have for many years past greatly relaxed the rigor and

[5] Standard Oil Co. *v.* United States, 221 U. S. 1.
[6] United States *v.* American Tobacco Co., 221 U. S. 106.

severity of that doctrine, whereas the courts of this country have maintained much of its original rigor.

Illustrations of this divergence may readily be found in the adjudicated cases.

In the Danbury Hatters Case[7] the Circuit Court of Appeals declared certain acts, which were considered in that case, to be unlawful, although, to use the Court's words: "The impelling motive of the combination was an effort to better the condition of the combiners, which except for the anti-trust act might be proper and lawful."

In the appeal to the Supreme Court in the same case,[8] that Court, after citing several of its previous decisions, said that they "hold in effect that the anti-trust law has a broader application than the prohibition of restraints of trade unlawful at common law."

This statement is particularly significant as emphasizing the wide distinction prevailing between the course of the decisions in England and in the United States with respect to the subject under consideration. The courts of England have steadily narrowed and relaxed the scope of the common law doctrine forbidding restraints of trade, whereas the cited case shows that the Supreme Court has construed the Sherman Law as having a broader application than the doctrine in question had at common law.

Further discussion would therefore seem unnecessary to establish the contention here put forth of the great divergence existing between the courts of the two countries in the respect now being considered.

In United States *v.* Chesapeake & Ohio Fuel Co.,[9] the Court, in granting an injunction against a combination affecting the coal industry, said:

> "It is said, however, that the increase in the volume of trade, the competition in a larger field of operations, the better condition of the product, and the maintenance of reasonable prices, resulting from the performance of the contract, benefit the public and justify the partial restraint of trade.

[7] Loewe *v.* Lawlor, 187 Fed. 522, 109 C. C. A. 288.
[8] 208 U. S. 274, 297.
[9] 105 Fed. 93.

But the policy of the law looks to competition, as the best and safest method of securing these benefits, and not to combinations which restrain trade."

* * * *

"The important question is not whether the performance of the contract so far has resulted in actual injury to trade, but whether the contract confers power to regulate and restrain trade, upon those charged with its performance. The attempt to confer power to regulate and restrain interstate commerce by contract is a usurpation of the functions of Congress, and cannot be sustained upon the ground that trade has not in fact been injured."

Upon an appeal from the foregoing decision[10] the Circuit Court of Appeals affirmed the judgment of the Court below and said that the Congress is given by the Constitution the power to regulate commerce between the States and with foreign Nations, and continued:

"* * * In the exercise of this right, congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not * * *"

"* * * The courts are not concerned with the policy of such a law. It is not for them to inquire whether it be true, as is often alleged, that this is a mistaken public policy, and combinations, in the reduction of the cost of production, cheapened transportation, and lowered cost to the consumer, have been productive of more good than evil to the public. * * *"

"And it is argued that the main purpose of this agreement being to increase the trade of the parties, to enhance competition in a larger field, and improve the character of the product, these objects are beneficial to the public as well as to the private parties, lawful in their scope and purpose, and justifying the indirect and partial restraint of trade involved in the execution of the agreement. * * * Wider markets and more trade may be the inducements to such agreements, but they are purposes which the Act of Congress does not permit to interfere with the freedom of interstate traffic. * * *"

[10] Chesapeake & Ohio Fuel Co. *v.* United States, 53 C. C. A. 256, 115 Fed. 610.

We have cited from this case at some length in order to point out the striking contrast which it presents to the decision of the Privy Council of England in the Australian Collieries Case, which will be discussed below—a case relating to the same industry as in the cited case and presenting a state of facts largely similar to the facts in the cited case, if not, indeed, showing a stronger situation in violation of the common law doctrine, but nevertheless declared lawful by the courts of England. The comparison of the English decision with the cited case presents conspicuously the wide divergence existing in the decisions of the courts of England and of the United States with respect to the doctrine here under consideration.

In Standard Sanitary Mfg. Co. *v.* United States,[11] the Supreme Court, speaking of the provisions of the Anti-Trust Law, said:

> "Nor can they be evaded by good motives. The law has its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties, and it may be, of some good results."

It is thus seen that the Sherman Law has been given a most comprehensive and drastic interpretation by the Federal courts, so that practically all agreements among competitors whereby competition among them is substantially reduced, are declared unlawful, without respect to the fact that such agreements may be based upon good motives and upon beneficial economic results.

A similar severity of construction is to be found in the decisions of the State courts in their interpretation of the common law doctrine in question. A typical illustration of this nature is to be found in the leading case of Richardson *v.* Buhl,[12] in which the Court said:

> "It is no answer to say that this monopoly has, in fact, reduced the price of friction matches. That policy may have been necessary to curb competition. The fact remains that it rests in the discretion of this company, at any time to raise the price to an exorbitant degree."

[11] 226 U. S. 20.

[12] 77 Mich. 632, 43 N. W. 1102.

Similarly, in the case of Anderson *v.* Jett,[13] the Court said:

> "The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is in the combination or agreement. The practical evil effect of the combination only demonstrates its character; but if its object is to prevent or impede free and fair competition in trade, and may, in fact, have that tendency, it is void, as being against public policy."

These cases show that the principles therein defined are contrary to the principles upon which similar cases have been uniformly decided in the courts of England. The cited cases show that it is the settled policy of the courts of this country, both Federal and State, to interpret cases arising under the common law doctrine forbidding restraints of trade, upon the basis of the power or opportunity for wrong-doing, and not the actual perpetration of a wrong. As will be shown below, the courts of England have regard only to the actual evil done as a result of such contracts or combinations, rather than to the power to do such evil. We believe it a proper assertion to make that it is largely upon this principle that the basis is to be found for the divergent course of the decisions in the courts of England as compared with the courts of this country with respect to the doctrine under consideration.

In addition to this radical difference which exists between the interpretation as given by the courts of England and by the courts of this country, there is a further important distinction to be found in the fact that much greater latitude and liberality are shown by the courts of England in passing upon cases where a combination or agreement has actually resulted in the carrying out of the purposes of the combination or agreement by the raising of prices or other similar effects. In the courts of England, not only is the mere power for wrong-doing disregarded as a basis for the condemnation of a given situation, but even where such power has been exercised, with the result, for example, that prices have been raised to the advantage of the combiners, or, what is more, even where competition has been suppressed to the advantage of the combiners, the courts of Eng-

[13] 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390.

land have uniformly refused to declare the combination unlawful merely because of those results, but have gone further and have considered whether or not the accomplishment of those results is in fact injurious to the public welfare.

Important typical illustrations of English decisions of this character are, (1) the case of Mogul S. S. Co. *v.* McGregor, Gow & Co.,[14] and (2) the case of Attorney General of the Commonwealth of Australia *v.* The Adelaide S. S. Co.[15]

The former case was decided upon the common law doctrine, while the latter case was decided upon an Australian statute somewhat similar to our Sherman Anti-Trust Law. In each of these cases a result was reached which is wholly at variance with the results uniformly reached in similar cases which have been decided by the courts of this country.

(1) The Mogul Steamship Case.

The Mogul case was an action brought by a rival firm of the defendants for damages for a conspiracy to prevent the plaintiffs from conducting the tea carrying trade between China and England, under a state of facts which leaves no room for doubt that in a similar action brought under the Sherman Anti-Trust Law the combination complained of would have been condemned. In the interest of brevity, we state the purposes of the combination in the language used by Sir Frederick Pollock, Professor of Jurisprudence at Cambridge University (Law Quarterly Review, 1890) as follows:

> "* * * to grant a rebate to persons employing exclusively the ships of the conference whilst refusing it to any one who employs a non-conference ship, and in case any non-conference steamer should attempt to load cargoes at Hankow, then to send as many conference ships as may be needed to under-bid the independent steamer without any regard to profit."

It cannot be questioned that in an action based upon this state of facts and brought under the Sherman Anti-Trust Law, the courts of this country would have declared the combination

[14] L. R. 21 Q. B. Div. 544, L. R. 23 Q. B. Div. 598 (1892), A. C. 25.
[15] (1913) A. C. 781; Law Journal 1914 Privy Council, p. 84.

to be unlawful. The courts of England, however, declared it lawful. Sir Frederick Pollock thus states the substance of the decision of the English court:

> "The decision * * * rests on the broad principle that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation (or other distinct illegalities) gives rise to no cause of action at common law, and, what is even more important, that any form of competition which would not be unlawful on the part of an individual does not become unlawful because it is carried out by a combination of individuals acting in concert."

This latter doctrine has been repeatedly negatived in the courts of this country. A type of these cases is People *v.* North River Sugar Ref. Co.,[16] where the Court of Appeals of the State of New York said:

> "It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will. For it is one thing for the State to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacuring enterprise; but if corporations can combine and mass their forces in a solid trust or partnership with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is open to enormous combinations, vastly exceeding in number and in strength, and in their power over industry any possibilities of individual ownership, and the State by the creation of the artificial persons constituting the elements of the combination and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may

[16] 121 N. Y. 582, 24 N. E. 834.

bear is one thing, what it should cause and create is quite another."

Against this statement we quote the following from the opinion in the Mogul Case in the Court of Appeal: [17]

"But I find it impossible myself to acquiesce in the view that the English law places any such restrictions on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own."

The necessary limits of this paper make it impossible to set forth a complete and adequate discussion of the Mogul Case as a basis for the assertion that it presents, in comparison with similar cases decided in this country, a far-reaching relaxation of the common law doctrine of restraints of trade. In the interest of brevity, it may be stated, as illustrating the point under discussion, that in the briefs submitted by counsel when the Mogul Case was under consideration by the House of Lords, the counsel for the plaintiff cited, in support of the contention that the combination created by the defendants was unlawful, a series of leading cases decided by the courts of this country and which have been uniformly accepted by us as authoritative and that in the brief in reply presented by the counsel for the defendants, Sir Charles Russell (later the Lord Chief Justice of England) met these cases with the statement, "None of the American decisions cited are of great authority." The opinions rendered by the judges who wrote the opinions for the House of Lords in substance and effect sustained the view thus stated by the counsel for the defendants, and the opinions themselves reveal that in many important particulars the doctrines enunciated in the Mogul Case are irreconcilably opposed to similar doctrines enunciated in like cases in this country.

The decision in the Mogul Case has been adhered to by the courts of England in all cases subsequently decided.[18]

It is quite natural, therefore, to find that in Great Britain

[17] L. R. 23 Q. B. Div. 598, 617.

[18] North Western Salt Co. *v.* Electrolytic Alkali Co. (1914), A. C. 461.

combinations and likewise co-operative agreements of an infinite variety of character are in free and undisturbed existence. It is within bounds to say that practically all of the important industries of Great Britain are the subjects of agreements of a co-operative nature, which in the United States would be declared unlawful.[19]

(2) The Australian Collieries Case.

Perhaps a more striking illustration of the wide divergence between the decisions of the courts of England and the courts of this country is to be found in the decision rendered by the Privy Council in the Australian Collieries Case.[20] The Australian Government, through its Attorney General, brought the suit upon the charge that practically the entire coal industry in Australia had been made the subject of an agreement to which the coal operators, the coal carrying railroads and steamship lines, and the wholesalers and the retailers in the coal industry were parties. It was charged that under this agreement the coal operators had agreed as to the respective quantities of coal which should be produced at each mine; that the steamship owners and the railway owners had agreed as to the freight rates to be charged; that the coal operators and the wholesale dealers had agreed upon the prices to be charged to the wholesalers and the prices at which the wholesalers should sell to the retailers, and that the retailers, in turn, had agreed as to the prices at which they should sell. In effect, the agreement apportioned and allotted the output of the mines, it fixed the rates that the steamship and railway companies should charge, it fixed the price of the coal from the producer to the wholesaler, from the wholesaler to the retailer, and from the retailer to the consumer. It is significant to add that the ultimate result was that the price of coal to the consumer was increased over what it had previously been. The suit was brought under an Australian statute (Australian Industries Preservation Act, 1906)

[19] See "The Trust Movement in British Industry" by Henry W. Macrosty.

[20] Attorney General of Australia *v.* Adelaide S. S. Co., *supra.*

which in a general way resembles the Sherman Anti-Trust Law. The substantive portion of the Australian statute is as follows:

> "Sect. 4—Any person who, either as principal or as agent, makes or enters into any contract, or is or continues to be a member of or engages in any combination, in relation to trade or commerce with other countries or among the States—
>
> (a) with intent to restrain trade or commerce to the detriment of the public; or
>
> (b) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers and consumers,
>
> is guilty of an offense."

The statute then proceeds with a further provision to the effect that "every contract made or entered into in contravention of this section shall be absolutely illegal and void."

It is to be noted that the phrase in the quoted statute "to the detriment of the public," and the further phrase contained in it "having due regard to the interests of producers, workers and consumers," have no corresponding counterparts in the Sherman Anti-Trust Law. The decisions under the latter law, however, make clear that the courts of this country have interpreted the Sherman Law in the same manner as if those phrases had been therein contained.

It is perfectly manifest that the combination thus assailed would have been declared unlawful if the suit had been brought in this country under the Sherman Law.[21] The courts of England, however, declared it lawful and dismissed the suit.

Examples taken from the opinions rendered by the English courts in this case reveal the broad distinction which those courts make in their interpretation of the law of restraints of trade, as contrasted with the interpretation made by the courts of this country.

Lord Parker, writing for the Privy Council, said:

"Contracts in restraint of trade were subject to somewhat

[21] See Chesapeake & Ohio Fuel Co. *v.* United States, *supra.*

different considerations. There is little doubt that the common law in the earlier stages of its growth treated all such contracts as contracts of imperfect obligation, if not void for all purposes; they were said to be against public policy in the sense that it was deemed impolitic to enforce them and not because every such contract must necessarily operate to the public injury. The old common law rule against enforcing such contracts has, however, been relaxed in more recent times. * * *

"* * * It is, however, in their Lordships' opinion, clear that the onus of showing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and that if once the Court is satisfied that the restraint is reasonable as between the parties, this onus will be no light one. * * *

"* * * The right of the individual to carry on his trade or business in the manner he considers best in his own interests involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others. * * *"

The expert student of the subject will readily perceive that this is in sharp opposition to the corresponding doctrine prevailing in this country.

Interesting light is thrown upon the view taken by Lord Parker, where, in the course of his opinion, he alludes to the Sherman Anti-Trust Law as follows:

"In the argument upon the true construction of the Act of 1906 considerable stress was laid on the cases decided by the Supreme Court of the United States under the analogous statute known as the Sherman Act, and in particular on the case of *Standard Oil Co. of New Jersey* v. *United States* [221 U. S. 1]. Although the judgments in this case are valuable for the light they throw on the development of the common law touching monopolies and contracts in restraint of trade, their Lordships do not think that the decisions themselves are of any real assistance in the present case. The Sherman Act, construed strictly, makes every contract or combination in restraint of trade and every monopoly or attempt to monopolize a statutory misdemeanor irrespective of any sinister intention on the

part of the accused and irrespective of any detriment to the public."

Contrary to the uniform view maintained by the courts of this country that it is the power for causing detriment to the public, rather than the doing of acts detrimental to the public, which controls, the Privy Council then proceeded to make a detailed study of the situation existing in the coal industry in Australia, and pointed out that ruinous conditions of competition had been existing which the combination under attack had allayed, and that "there was no evidence (at any rate, no sufficient evidence) of injury to the public." The result of such study is shown by the following quotation, which will be readily perceived to be at variance with enunciations in corresponding situations made by the courts of this country:

"* * * It can, in their Lordships' opinion, never be of real benefit to the consumers of coal that colliery proprietors should carry on their business at a loss, or that any profit they make should depend on the miners' wages being reduced to a minimum. Where these conditions prevail, the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of employment, less coal will be produced and prices will consequently rise until it becomes possible to reopen the closed collieries or open other seams. The consumers of coal will lose in the long run if the colliery proprietors do not make fair profits or the miners do not receive fair wages * * *."

These statements are strikingly significant and have an unfamiliar sound to students of the American doctrine.

The foregoing views with respect to these two leading cases are given as showing the wide distinction existing between the doctrine under consideration as enunciated by the respective courts of England and of this country. The limits of this paper forbid, although an adequate presentation of the subject would compel, a more elaborate and detailed presentation of the two cited English cases.

We believe, however, that sufficient has been shown therefrom to make clear that in this country the common law doctrine forbidding restraints of trade and the Sherman Anti-Trust

Law, which is based upon that doctrine, are interpreted with a degree of rigor and severity far beyond that with which they are interpreted by the courts of England.

In so far as the American courts have thus maintained the rigor of the common law against the practices and the existence of combinations in the nature of trusts or monopolies, there can be no question that the spirit and sentiment of this country fully sanction and support the same. In so far, however, as such interpretation is extended to the prohibition of the infinite variety of trade agreements designed to promote efficiency and economy and to diminish wasteful and ruinous methods of competition, it is a question justifying serious thought whether the more lenient methods pursued by the courts of England could not with advantage be adopted by the Congress and the courts of this country.

The American cases which have been cited in the earlier part of this paper show that co-operative agreements, even when based upon good motives and when producing good results, are nevertheless condemned because of the fact that they restrain the freedom of action of the parties to the agreement, thereby, in the view of our courts, creating an unlawful restraint of trade. If some method could be devised whereby agreements of this character, when concededly based upon good motives and productive of good results, could be differentiated from agreements of sinister purpose and producing harmful results, and be deemed lawful, while the latter should continue to be deemed unlawful, it seems clear that the result would be economically advantageous.

The history of the Sherman Law and the debates in Congress upon which its enactment was based, indicate that it was purposely framed on broad and comprehensive lines with the single and declared purpose of attacking, destroying and repressing the great aggregations of capital which were then menacing the orderly conduct of the business affairs of the country and making difficult, if not impossible, full and fair competition upon the part of independent traders. Its later development shows that the broadly comprehensive character of its language caused the courts of this country to bring within

its prohibitions not merely these great aggregations of capital but an infinite variety of co-operative agreements which did not possess any of the qualities of a trust. It is suggested that perhaps an orderly method may be devised whereby the Sherman Anti-Trust Law may, by suitable amendment, be restored to what appears to have been its original purpose, at the same time establishing suitable safeguards whereby agreements lacking the elements of monopoly may be legalized in such manner as to prevent their being developed into agencies of monopoly.

There are indications of a changing attitude on the part of Congress and of the American courts in the direction of a relaxation of the severity of the law on this subject and of its interpretation. On the part of Congress, this is shown by the recent enactment (April 10, 1918) by Congress of the so-called Webb-Pomerene Law, which, in substance, removes the prohibitions of the Sherman Law with respect to combinations or agreements operative in foreign countries. This law is still in its experimental stage and its efficacy cannot, therefore, yet be determined. By express terms, however, the Webb-Pomerene Law leaves unimpaired the prohibitions and penalties of the Sherman Law with respect to combinations or agreements operative within the United States, and to this important extent, therefore, the new law makes no change in the situation. It nevertheless represents a pronounced change on the part of Congress worthy of the attention of students of the subject, as perhaps indicating a changing public policy.

On the part of the courts, while the assertion must be made with some caution, there seem grounds for the belief that in some recent decisions the Federal courts have indicated a purpose to interpret the existing law with greater liberality. Cases of this nature are cited below.[22]

A proper presentation of this subject would necessitate an examination and discussion of these cases because of their im-

[22] United States *v.* United Shoe Machinery Co., 247 U. S. 32; United States *v.* Keystone Watch Case Co., 218 Fed. 502; United States *v.* United States Steel Corp., 223 Fed. 55; Great Atlantic & Pacific Tea Co. *v.* Cream of Wheat Co., 141 C. C. A. 594, 227 Fed. 46; United States *v.* Colgate & Co., 39 Sup. Ct. 465 (decided June 2, 1919).

portance as indicating a tendency to relax and mitigate the severity of the doctrine which has been here considered. Limitations of space, however, make this impossible in the present paper. It is deemed proper to say that the student of the subject will gain an imperfect understanding of the existing situation without a careful examination of these cases.

A general survey of the situation sought to be exhibited in the foregoing pages may be thus stated. The Sherman Law was enacted for the purpose of disrupting the great trusts. It was framed in such comprehensive language as to bring within its scope not merely trusts, but also every kind of co-operative agreement which materially lessened the power of competition among the parties to such agreement. Prior to the enactment of the Sherman Law there was no Federal statute on this subject. Both prior to the time of such enactment and subsequent thereto, the State courts had, with practical uniformity, construed and interpreted the common law doctrine forbidding restraints of trade with only slight abatement of its ancient common law rigor.[23] The Federal courts at first interpreted the Sherman Law in such manner as to make it futile in the disruption of trusts.[24] Subsequently, beginning with the case of Addyston Pipe & Steel Co. *v.* United States,[25] the Supreme Court gave to the Sherman Law a rigorous interpretation of even broader application than the common law doctrine upon which the Sherman Law was based, culminating in a series of important decisions which gave to the Sherman Law the maximum of severity and power.

On the other hand, the courts of England have steadily relaxed the severity of the common law doctrine in question, so that it is measurably within bounds to say that within the jurisdiction of the courts of England that doctrine has in large part lost its potency.

Amid much confusion of thought, due to the intricacy of the

[23] See Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419.

[24] United States *v.* E. C. Knight Co., 156 U. S. 1; In re Terrell. 51 Fed. 213; In re Corning, 51 Fed. 205; In re Greene, 52 Fed. 104; United States *v.* Nelson, 52 Fed. 646.

[25] 175 U. S. 211.

subject and the conflicting interests affected, there has arisen in this country a sentiment demanding a modification of the Sherman Law so as to liberate from its prohibitions many classes of co-operative agreements, such as price agreements intended to prevent ruinous and wasteful competition and other like agreements where it is claimed that the quality of monopoly does not exist and would probably not be possible of attainment. With the purpose of clarifying the situation, Congress enacted the so-called Clayton Law. It is claimed that the effect of the Clayton Law in clarifying or ameliorating the situation has been futile.[26]

Quite recently the Congress has made, in the Webb-Pomerene Law, a radical change by withdrawing the prohibitions of the Sherman Law with respect to foreign trade; and likewise, quite recently, the Federal courts have, in a number of important cases, rendered decisions which seem to indicate a marked change in the direction of a relaxation of the doctrine in question.

The subject is one of great importance and it involves intricate questions of economic principle and policy. As was stated at the outset of this paper, the scope of the subject is such as to require for its proper presentation a discussion reaching the proportions of a treatise.

The present paper has attempted merely to indicate in as brief a form as possible the salient features of the subject.

Felix H. Levy.

NEW YORK CITY.

[26] See an article by the writer "The Clayton Law—An Imperfect Supplement to the Sherman Law," 3 VA. LAW REV. 411.